Supreme Court, U.S.
SEP 10 1975
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in the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1610

RICHARD H. OLSEN,
Petitioner

v.

SAUL GOODMAN,
Respondent

REPLY TO BRIEF IN OPPOSITION

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In accordance with the provisions of Rule 24.4, this Reply will be limited to arguments first raised in Respondent's Brief in Opposition.

I

Respondent asserts that the Judgment of the Supreme Court of Florida entered November 7, 1974, remanding the cause for retrial, was not a Final Judgment.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 497 (1975), this Court discussed at length the question of what constitutes a final judgment under 28 U.S.C. 1257. It concluded that there are now at least four categories of cases wherein it has treated resolution of a Federal issue by a State Supreme Court as a "final judgment" for the purposes of 28 U.S.C. 1257 and has taken jurisdiction without awaiting completion of additional proceedings in lower State courts. Though each category has merit and applicability to the case *sub judice*, the first category is directly on point.

In describing the category of cases, this Court said:

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained.* In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills v. Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took

jurisdiction on the reasoning that the appellant had no defense other than his federal claim and could not prevail at the trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in the judicial systems already troubled by delays due to congested dockets.' Id., at 217-218." (emphasis supplied.)

In the instant case, the Supreme Court of Florida reversed the *per curiam* affirmance by the District Court of Appeal of the jury verdict in favor of the Petitioner. The Court remanded the case to the trial Court for a new trial but struck the defense of usury, the only defense interposed by the Petitioner at the trial. Though this case was tried in Florida the applicable law was that of New York where the defense of usury is a substantive defense and is available to the Petitioner. The Florida Supreme Court, by its refusal to give effect to a substantive defense permitted under the laws of New York, denied the Petitioner due process of law and subjected him to irremedial liability. Without the defense of usury, the outcome of further proceedings is preordained. Hence, the Judgment of the Supreme Court of Florida is for the purpose of this appeal a "final judgment or decree."

Additional cases supporting this position are: *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Pope v. Atlantic C.I.R. & Co.*, 345 U.S. 379 (1953).

II

Respondent asserts that the questions raised in the Petition for a Writ of Certiorari were not raised below.

The controlling principle as to a sufficient presentation of a Federal question is set forth in the case of *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63 at 67, 73 L.Ed. 184, 49 S.Ct. 61 (1928), where this Court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground thereof be brought to the attention of the state court with fair precision and in due time. And, if the record as a whole shows either expressly of by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

The proceedings in this case at the trial and District Court of Appeal level involved no Federal questions and matters herein were properly considered and determined. The Federal issues involved arose from the Judgment of the Supreme Court of Florida on November 7, 1974, where the Court reversed the Trial Court and District Court of Appeal. Substituting itself for the jury as the trier of fact, that Court not only misconstrued the facts of the case but refused to apply the applicable New York law. The first and the only opportunity available to the Petitioner to raise a Federal question and contest the judgment of the Supreme Court of Florida was in the Petition for Re-

hearing. Thus, the raising of issues which are inherently federal questions at that time should be construed as timely and proper. As will be seen in Respondent's Appendix D, Petitioner in Paragraph 1 of his Petition for Re-Hearing, raised the question of the Supreme Court of Florida applying Florida decisions on Florida law in a cause where the laws of the State of New York governed.

III

Respondent's Brief urges that this Court will not review the judgment of the Supreme Court of Florida as to its jurisdiction in this matter under the Florida Constitution.

The general rule adopted by this Court that it will not review a judgment of a State Court where it is contended that the court exceeded the powers granted it by the State Constitution should not be followed blindly but should be considered in light of all of the facts surrounding the case.

The Supreme Court of Florida itself recognized, in the case of *Nielsen v. The City of Sarasota*, 117 So.2d 731 (1960), that its power to issue writs of certiorari was substantially restricted and drastically circumscribed by the adoption of a Constitutional Amendment in July of 1957. To clarify the criteria necessary to obtain conflict jurisdiction for a writ of certiorari, the Court, in the case of *Kyle v. Kyle*, 139 So.2d 885, at 887 said:

> "We have said that conflict must be of such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter."

In the case *sub judice* two Florida cases, *State of Florida, ex rel, The Florida Bar v. Delves*, 160 So.2d 114, (1964), and *The Florida Bar v. Pitts*, 219 So.2d 427 (1969), were presented to the Florida Supreme Court to support conflict jurisdiction necessary for the issuance of a writ of certiorari. Both of these cases concerned themselves with the disciplining of attorneys, initiated by the filing of a grievance with the Florida Bar Association, which grievance is governed by the Integration Rules of that Association. The Integration Rules, quasi-criminal in nature, are administrative regulations relevant only to Florida proceedings. The Respondent, in his Brief In Opposition To Petition For Writ of Certiorari, on pages 22 and 23, admits that both the *Delves* and *Pitts* cases, *supra*, set forth the *Florida* law on estoppel to claim usury by an attorney. The Florida law is not applicable to this case and the issues are governed by the statutory laws of New York. Thus no conflict can exist. How, then, can the Supreme Court of Florida justify its assertion of jurisdiction on the basis of conflicting decisions where the cases cited by it have absolutely no application to New York law, in a proceeding where only New York law is applicable?

Unlike the *Delves* and *Pitts* cases, the present case does *not* involve a disciplinary proceeding against an attorney. On January 22, 1973, while Respondent's initial Petition for a Writ of Certiorari was pending before the Florida Supreme Court, Respondent filed a grievance with the Florida Bar Association against the Petitioner on charges similar to those alleged in the respondent's Brief in Opposition. After a full investigation and hearing, the Grievance Committee entered a Notice of No Probable

Cause. A copy of the Grievance, Notice of Hearing and Determination are printed as Appendices A, B, and C hereto.

It is appropriate at this time to correct a misconception which runs throughout Respondent's Brief. A reading of the Brief in conjunction with the *Delves* and *Pitts* cases *supra*, would lead one to believe that the Petitioner had alone prepared the agreement, but this is not so. The facts of record are that although the agreement was handwritten by the Petitioner, the terms and conditions were dictated to the Petitioner by the Respondent. Printed as Appendix D hereto are pages 224 and 225 of the Trial Transcript.

In examining the Supreme Court of Florida's assertion of jurisdiction, this Court should consider the matter in light of the uncontradicted testimony taken at the Impeachment Hearings held on three of the Justices who sat on Panels adjudicating this case. The Impeachment Committee Hearings were held subsequent to the Judgment entered by the Court, and the testimony and exhibits showed serious irregularities in the handling of this case.

By way of illustration, the records of the Supreme Court of Florida in this case (previously confidential), on the first appeal show that a vote was taken on the matter of jurisdiction and the vote was four to one to deny same. Justice McCain was one of the four who voted to deny. A memorandum was prepared recommending denial (Appendix H, Pages A-26, 27, Petition for Writ of Certiorari). No order issued from the Court, however, denying jurisdiction. Instead, a conference was held on Feb-

ruary 1, 1973, (Appendix H, Page A-22, Petition for a Writ of Certiorari) and the case was subsequently reassigned, which is irregular in itself, to Justice McCain who then wrote a memo on jurisdiction on February 5, 1973, recommending grant of jurisdiction without oral argument. This was done by a vote of four to one. A copy of the instrument showing the two votes is printed as Appendix E hereto. This document was obtained from the Clerk of the Supreme Court of Florida subsequent to the filing of Petitioner's Petition for a Writ of Certiorari with this Court. The existence of this document was not known at the time of the filing of the Petition.

The Petitioner does not seek to challenge the integrity of certain members of the Panels who sat in judgment in this cause but does seek to have this Court closely examine all of the actions of the Court in the handling of the instant case.

Respectfully submitted,

/s/ Robert D. Peloquin, Esquire
Counsel for Petitioner
1707 - H Street, N.W.
Suite 400
Washington, D.C. 20006

John W. Prunty, Esquire
Counsel for Petitioner
837 City National Bank
Miami, Florida 33130

APPENDIX

APPENDIX A

January 22, 1973

Received
Mar. 8, 1973
THE FLORIDA BAR
Miami Office

Board of Governors
Florida Bar
Tallahassee, Florida

Attention: Marshall Cassedy, Esquire,
Executive Director

Re: Richard H. Olsen
Request for Investigation and
Disciplinary Action

Gentlemen:

I am writing to request that a full investigation be made into certain actions of the above named attorney, who is practicing law in Miami, Dade County, Florida. These actions occurred while this attorney was representing me.

I had known Mr. Olsen for a good period of time prior to 1968, when he sought me out and discussed with me the possibility of investing in Omega Equities Corporation. Mr. Olsen persuaded me to purchase 25,000 shares on my own account for $150,000.00, and persuaded me to lend him $150,000.00 so that he could purchase 25,000 shares, as well. He agreed to repay me the $150,000.00 with no interest on or before May 31, 1969.

This agreement was reached on September 17, 1968, when Mr. Olsen drew up a contract providing for the

same. We also agreed that if I wished to sell the Omega stock between October 1, 1969 and December 31, 1969, that he would repurchase the same from me at a price of $10.00 a share.

On September 18, 1969, I gave a check to Richard Olsen, as Trustee, for the amount of $300,000.00. He purchased the stock accordingly.

Mr. Olsen repaid $60,000.00 of the $150,000.00 he had borrowed from me, but subsequently refused or was unable to pay the balance and I was forced to institute suit seeking collection of the balance of my money on the $150,000.00 loan.

Mr. Olsen answered by contending that the contract (which he, himself, had drawn by hand) was usurious, and that, therefore, he had no responsibility to pay the same.

The aforementioned suit is still on appeal to the District Court of Appeal of Florida, Third District. In the lower court Plaintiff's motions for summary judgment and for directed verdict were denied and the case was sent to the jury, the lower court refusing to hold that the contract, on its face, was not usurious. The jury came back with a verdict for the Defendant, Olsen.

The gist of my request for an investigation into Mr. Olsen's conduct is the fact that he borrowed this $150,000.00 from me, himself drew the very contract which he contended in court was usurious, and so far has abused his position of trust with me as attorney in using the law to circumvent repayment to me of a just debt which he has incurred.

It has recently come to my attention that the Florida Bar will not condone such conduct on the part of an attorney under the circumstances as exist in this situation. I have had the opportunity to read over the case of The Florida Bar v. O. E. Pitts, cited at 219 So.2d 427, and it appears that the circumstances of that case are exactly the same as the circumstances which have been imposed upon me by Mr. Olsen.

Accordingly, I respectfully request that an investigation be made of this matter and that hearing be held to determine Mr. Olsen's fitness to continue in the practice of law.

Very truly your,

/s/ Saul Goodman

Saul Goodman

cc: Dade County Bar Association
Grievance Committee
111 N.W. 1st Avenue
Miami, Florida

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	**NOTICE OF HEARING**
	)	(A Confidential Procedure
vs.	)	Under The Rules of
	)	Discipline)
RICHARD OLSEN	)	

Complainant: SAUL GOODMAN

TO: Accused Attorney:

RICHARD OLSEN
837 City National Bank Building
25 West Flagler Street
Miami, Florida 33131

RE: File No: 11J73-5
Bar Counsel: MICHAEL FITZGERALD
Subject: Possible violation of Canon 1 DR1-102(a)(1) and (a)(4); Canon 4 DR4-101(b)(2)(3); and Canon 5 DR5-101(a) and 104(a), in re: dealings with Saul Goodman.
TIME: 7:00 o'clock P.M.,
TUESDAY, AUGUST 14, 1973
PLACE: Fifth Floor, Dade County Courthouse,
Miami, Florida

TO COMPLAINANT

You are requested to attend this hearing at the time, date and place above stated, to give evidence and to bring with you all papers pertaining to this matter. You may bring with you any witnesses which you feel may be of help to this Committee in its investigation. You may be represented by counsel, if you desire.

You are advised that these proceedings are confidential. The existence of this investigation and the identity of the Attorney are to remain confidential and should not be discussed by you with anyone other than the witnesses you are actually bringing to the hearing. This matter has been assigned to one of the Committee Members to investigate as indicated above. Please feel free to call him if you have any questions. Your cooperation is appreciated.

TO ACCUSED ATTORNEY

Grievance Committee "J" will sit at the time and place indicated above for the purpose of investigating alleged misconduct. Please contact the indicated investigator if you are not already fully aware of the nature of the complaint and for such further information as you need to furnish a reply. The Committee advises you that it is helpful to the Committee if you will furnish to the investigator a written reply far enough in advance of the hearing so that the investigator and other members will have time to review same prior thereto.

You are hereby notified of the following: Your right to appear at the hearing in person, by or with counsel; to furnish a written or verbal statement, sworn or un-

sworn, or by all of the foregoing. At the hearing you may then and there explain, refute or admit the alleged misconduct. Said hearing will be held pursuant to the authority of the Integration Rule of The Florida Bar. Your attention is particularly directed to Article XI, Rule 11.04 of said Rule. Upon your failure to attend said hearing, these proceedings will be conducted in your absence.

* * *

I HEREBY CERTIFY that a true copy of the foregoing was mailed to the accused attorney by Certified Mail RRR, the Complainant, The Florida Bar, and to all Committee Members this 30th day of July, 1973.

ELEVENTH JUDICIAL
CIRCUIT GRIEVANCE
COMMITTEE "J"
111 N.W. First Avenue
Miami, Florida 33128

By /s/ James E. Glass
JAMES E. GLASS, Chairman

CM #396557

APPENDIX C

THE FLORIDA BAR
Tallahassee, Florida 32304

Reply To: GRIEVANCE COMMITTEE "J"
1002 Ainsley Building
Miami, Florida

Case No. 7J 73-5 Date: August 28, 1973

CONFIDENTIAL

To: Complainant Mr. Saul Goodman
c/o Bonell
5750 Collins Avenue, Apt. 4-J
Miami Beach, Florida

NOTICE OF NO PROBABLE CAUSE

The complaint recently filed with the grievance committee against a member of The Florida Bar, assigned the indicated case number, was carefully investigated and considered by the committee. The committee found insufficient evidence to show a violation of professional ethics and closed the case.

/s/ James E. Glass
James E. Glass
Chairman
Judicial Circuit Grievance
Committee "J"

cc: Staff Counsel, The Florida Bar
Designated Reviewer
Richard H. Olsen

APPENDIX D

* * *

[224] Q Now, who actually had requested that this agreement, Plaintiff's Exhibit 1, be prepared and drawn?

A Mr. Goodman did.

Q Where was that, sir?

A The first knowledge of putting the agreement in writing was after I arrived in New York, and it was at the meeting with Jean Jackson, originally at the Hampshire House.

Q Now, this might be construed as somewhat of an informal agreement, since it is in your handwriting. Were you willing to enter into a more formal agreement if requested?

A Yes, sir. I had no objections and advised him as such.

Q Now, why was the paragraph included in the agreement which provided that you must buy back Mr. Goodman's stock at $10 per share?

A Mr. Goodman insisted that it be put in the agreement to guarantee a repurchase of the stock so he could make a profit. Otherwise, he would not [225] loan the money.

Q Did he state how much profit he wanted?

A $100,000.

Q What that a condition to making the loan?

A It was an absolute condition.

Q Now, Mr. Goodman has stated that he wanted nothing in return for the loan; is that correct?

A No, sir, that's incorrect. I wouldn't give him $100,000 or commit myself to a hundred thousand dollar payment just to give it away.

He had stated that it must go into the agreement, and he wanted it in writing, because the original discussion on this was a simple note from me for $150,000, which I was to give him, and when I got up there he changed.

He said, "I want this in writing," and that was the result, the agreement that was drafted.

Q Have you computed what the rate of interest on $100,000 would be on this transaction?

A Yes, sir. That loan was for eight months and thirteen days, and the interest comes out to—I believe it's 107.84 per cent.

Q That is on $150,000?

A Yes, sir.

APPENDIX E

DETERMINATION OF JURISDICTION
CERTIORARI

IN THE SUPREME COURT OF FLORIDA

CASE NO: 43168

FILED
DEC 18 1972
CLERK SUPREME COURT

SAUL GOODMAN, :
Petitioner, :
vs :
RICHARD H. OLSEN, :
Respondent. :

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, SAUL GOODMAN, presents this, his Petition for Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an order of the District Court of Appeal, Third District, dated the 17th day of November, 1972, and filed in the records of said District Court on the same date in Minute Book 47, Page 131.

2. This Petition is presented under and pursuant to Article 5, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This Petition is accompanied by a transcript of so much of the proceedings as Petitioner seeks to have reviewed including the decision Petitioner seeks to have reviewed together with a true and correct copy of the Transcript of Testimony. Since a certified copy of the Transcript of Testimony was heretofore delivered to Appellee counsel we are not delivering the Appellee an additional Transcript of Testimony but only that portion of the Trans-